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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 363

JACK S. MACHIN *Petitioner,*

v.

EUGENE M. ZUCKERT, SECRETARY OF THE AIR FORCE, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Jack S. Machin, prays that a writ of Certiorari issue to review the judgment of the United States Court of Appeals District of Columbia Circuit, entered March 9, 1963.

Opinions Below

An opinion of the District Court entered before the assertion of the claim of privilege is reported in 28 F.R.D. 29 (D.C. D.C. 1961). The District Court order appealed from was entered without opinion. (J.A. 74.[1]) The opinion of the Court of Appeals is reported in 316 F.2d 336.

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[1] J. A. refers to the Joint Appendix contained in the transcript of record from the United States Court of Appeals, District of Columbia Circuit.

Jurisdiction

The opinions of the United States Court of Appeals for the District of Columbia Circuit were made and entered in the above case on January 17, 1963 (Appendix 19) [2] and the supplemental opinion of March 9, 1963 (Appendix 26). Judgment was entered March 9, 1963 (Appendix 29); Petition for Rehearing En Banc was denied May 13, 1963; stay of entry of judgment for period permitted by law, for filing of petition for Writ of Certiorari in the Supreme Court of the United States, granted May 27, 1963.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1); the jurisdiction of the United States Court of Appeals District of Columbia Circuit was based upon 28 U.S.C. 1291; the jurisdiction of the United States District Court for the District of Columbia was based upon Title 28, United States Code Rule 45(d) Sections 1331(a) and 1332(a) and Title 14, Section 204, D. C. Code 1961. See also *Petition of Boeing Airplane Co.*, 280 F.2d 654 (C.A. D.C. 1960); *Martin* v. *Chandis Securities Co.*, 128 F.2d 731 (C.A. 9, 1942); *Cohen* v. *Beneficial Loan Corporation*, 337 U.S. 541, 546 (1949).

Questions Presented

Petitioner, Capt. Jack S. Machin, a paraplegic double amputee was retired from active duty with the United States Air Force because of this disability resulting from the crash of a B-25 airplane. He sued the New York manufacturer for negligence and breach of warranty. He then sought discovery of the Air Force Aircraft Accident Investigation Report by way of deposition of the Secretary of the Air Force and issuance of a subpoena *duces tecum*

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[2] Appendix refers to the appendix appended to this petition.

pursuant to Rule 45(b) and (d)(1), Federal Rules of Civil Procedure. Respondent, Secretary of the Air Force, filed a motion to quash the subpoena on the grounds of unreasonableness and oppressiveness, which motion was denied. *In Re: Subpoena Served Upon Eugene M. Zuckert, Secretary of the Air Force*, 28 F.R.D. 29, (D.C. D.C. 1961) (JA 55-63). The Secretary then filed a claim of privilege in the District Court on the ground that disclosure of the reports would prejudice the efficient operation of the Department of the Air Force and the defense interests of the United States, would be contrary to the public interest and hence would not be warranted, citing Air Force Regulation 62-14 and 10 U.S.C. 8012. By order dated August 1, 1961, the District Court granted the Secretary's motion to quash.

Upon hearing of this cause the Court of Appeals affirmed in part respecting testimony of private parties who participated in the investigation and as to portions of the report reflecting Air Force recommendations as to policies to be pursued. It reversed in part, authorizing the release of "... factual findings of Air Force machinists who examined the wreckage," citing *Boeing Airplane Co.* v. *Coggleshall*, 108 U.S. App. D. C. 106, 112-13, 280 F. 2d at 660, 661 (1960). The Court gave the Secretary permission to show cause why the factual findings of the mechanics should not be given to Appellant. Supplementing this opinion after response and answer by the Secretary and Petitioner's reply the Court rejected "the notion that the Secretary should himself decide what portions of the [Air Force mechanics] reports are or are not privileged." The mechanic's reports alone as segregated from the Air Force Accident Investigation Report were ordered submitted to the District Court on remand for determination of the privileged portion.

The questions presented are:

1. Can the Secretary of the Air Force sustain a claim of Executive Privilege to bar discovery of the Air Force Aircraft Accident Investigation Report in his possession where the following conditions exist:

(a) Where the report contains no military or state secrets as required in this Court's decision in *U.S. v. Reynolds*, 345 U.S. 1, and where the alleged hampering of efficient operation of a government program and alleged impairment of national security are ill founded, without substance.

(b) When essential factual information exclusively within control of the Government and not otherwise available to Petitioner is contained therein.

(c) Where the Secretary's refusal will likely result in failure of Petitioner's New York civil action pending against the manufacturer of the defective propeller assembly.

(d) Where the refusal to disclose is a bald-faced attempt to insulate the Government suppliers from the consequences of the suppliers' culpable negligence.

(e) Where the statutory authority to prescribe regulations not inconsistent with law for the government of his department, relied upon by the Secretary to defeat discovery, has been expressly amended by Congress to negate withholding of information or limiting the availability of records to the public thus making his actions here contrary to public policy.

(f) Where the lower court had foreclosed the question of unreasonableness of the subpoena duces tecum adversely to the Government prior to its claim of Executive Privilege.

2. Does the Secretary of the Air Force through the President of the United States have the legal right to have

the courts enforce a claim of Executive Privilege based solely upon the Constitutional doctrine of separation of powers?

3. Assuming arguendo the existence of valid grounds for non-disclosure, should the District Court be permitted to examine the entire Aircraft Accident Investigation report *in camera* to determine those specific portions of the report which should be disclosed to the Petitioner thus preventing the Secretary from himself deciding what portions of the reports are or are not privileged?

Statutes, Federal Rules, and Regulations Involved

Title 5 United States Code:

Sec. 22 "The head of each department is authorized to prescribe regulations not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it." Note this section was amended in 1958 by adding the following:

This section does not authorize withholding of information from the public or limiting the availability of records to the public." (R.S. Sec. 161; August 12, 1958, Pub. L. 85-619, 72 Stat. 547)

Title 10 United States Code:

Sec. 8012 provides in pertinent part:

"Secretary of the Air Force . . . (f) The Secretary may prescribe regulations to carry out his functions, powers and duties under this title."

Department of Air Force Regulations:

AFR 62-14, para. 49(a) (J.A. 5-6).
AFR 62-14A, para. 52f (1) (J.A. 6-7).

Federal Rules of Civil Procedure:

Rule 45(d)(1):

"Proof of service of a notice to take deposition as provided in Rules 30(a) and 31(a) constitutes a sufficient authorization for issuance by the clerk of the District Court for the District in which the deposition is to be taken, of subpoenas for the persons named or described therein. The subpoena may command the person to w' m it is directed to produce designated books, papers, documents, or tangible things which constitute or contain evidence relating to any of the matters within the scope of examination permitted by Rule 26(b) but in that event the subpoena will be subject to the provisions of subdivision (b) of Rule 30 and subdivision (b) of this Rule 45."

Rule 45(b) provides in pertinent part:

"A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive . . ."

Rule 30(b) provides in pertinent part:

"'. . . and for good cause shown . . . the court may make any other order which justice requires to protect

the party or witness from annoyance, embarrassment or oppression."

Rule 26(b) provides in pertinent part:

"Unless otherwise ordered by the court as provided by Rule 30(b) or (d), the deponent may be examined regarding any subject matter, not privileged . . ."

Statement of the Case

Appellant Machin, then a navigator on active duty with the United States Air Force, was the sole survivor of a B-25 airplane crash which occurred on May 17, 1956, at Lowry Air Force Base, Denver, Colorado. As a result of this crash, Machin suffered horribly severe injuries which have now rendered him a paraplegic double amputee. (J.A. 17). Now cut in half, he faces a life of frustration and torture. An action was commenced in New York against the manufacturer of the propeller assembly, United Aircraft Corporation, asserting that a defect in the propeller assembly caused it to overspeed and to improperly feather. This defect deprived the pilot of effective control of the aircraft and proximately resulted in the crash and the ensuing injuries to Appellant. (J.A. 17).

This case came before the Court below on the motion of the Appellee, Secretary of the Air Force Eugene M. Zuckert, to Quash Foreign Subpoena F.S. No. 9-61 dated February 1, 1960 (J.A. 51-52). This subpoena was issued for the taking of his deposition in the case of *Machin* v. *United Aircraft Corporation* (S.D. N.Y., Civil Action No. 141-91). The original motion was made pursuant to Rule 45(b) of the Federal Rules of Civil Procedure upon the grounds of unreasonableness and oppressiveness. (J.A. 51). Thereafter, a claim of Executive Privilege was filed by Appellee. (J.A. 64-65).

The background of the New York action is set forth in Appellant's Opposition to Motion to Quash filed below against an identical subpoena issued against the Hon. Dudley C. Sharp, who preceded Appellee in office. (J.A. 16). The Sharp subpoena was quashed due to Secretary Sharp's resignation from office by Order of Matthews, J., dated January 30, 1961. (J.A. 30).

The complete facts are also set forth in an excellent opinion filed by Matthews, J., in the Court below in this case prior to the filing of the Secretary's claim of Executive Privilege. *In re Subpoena Served Upon Eugene M. Zuckert, Secretary of the Air Force*, 28 F.R.D. 29 (D.C. D.C. 1961). (J.A. 35).

On June 20, 1958 Machin accompanied his New York counsel to Norton Air Force Base, California, where the Aircraft Accident Investigation Reports sought to be obtained by Appellant were stored. Machin was permitted to superficially read the file but make no notes. Counsel was not permitted to see the report. (J.A. 18). As a result of the refusal of the Air Force to furnish a copy of the report to Appellant or counsel, a letter was written to the then Secretary of the Air Force requesting that a copy of this report be furnished. The Secretary refused to release the Aircraft Accident Investigation Report but offered to supply the names of witnesses who testified before the Accident Investigation Board and enclosed a Summary of the findings of the Board. (J.A. 18). By letter of August 19, 1958 (J.A. 30), a request was made for the names of the witnesses and copies of photographs and exhibits used by them. The names were furnished and the photographs and exhibits refused by letter of September 2, 1958. (J.A. 31).

On November 17, 1959, Appellant's New York counsel sent similar letters to each of the 15 witnesses named by the Air Force. (J.A. 34-35). Answers were received from four of the fifteen. Three said they saw the crash and nothing more. One referred inquirer to Director of Flight Safety Research at Norton Air Force Base. The other 11 did not reply or letters were returned as undelivered because the addresses furnished counsel were incorrect. (J.A. 19, 55-56).

The difficulties encountered in obtaining the information from the witnesses compelled counsel to try other means. After serving a notice on adversary counsel in the New York action of the intention to take deposition of the Hon. Dudley C. Sharp, Secretary of the Air Force, on written interrogatories (Rule 31, Federal Rules of Civil Procedure), a subpoena duces tecum was issued to the Secretary to obtain these answers. A copy of these interrogatories and the interlineated answers subsequently furnished, with covering letter dated June 8, 1960 (J.A. 44-45), are set forth at J.A. 35-43.

Counsel advised the Secretary that in view of the answers received it would not be necessary to obtain the copy of the Accident Investigation Report nor the answers of the Secretary to the Interrogatories. (J.A. 45-46). This was done in anticipation of obtaining full information from the witnesses. Counsel again wrote to the witnesses who had previously answered and received information relating to their observation, which information was referred to in Appellant's Opposition to Motion to Quash. (J.A. 20). The remaining witnesses undoubtedly would, if called to testify, rely on their statements which were inaccessible to Appellant.

In June 1960 requests were made to Air Force officials for information relating to tests, made after the crash, of component parts of the aircraft involved. (J.A. 46). Release of the test results was refused as privileged. (J.A. 48). Thereafter Appellant sought to obtain the Aircraft Accident Investigation Report by way of deposition and subpoena. (J.A. 3). These documents bear caption Foreign Subpoena No. 9-61 in the District Court.

The Appellee's motion to quash filed under Rule 45(b) of the Federal Rules of Civil Procedure and all subsequent actions by the Court below were filed under the caption Misc. 7-61, under which case number the Notice of Appeal was filed. (J.A. 74).

The Motion of Secretary Zuckert to Quash the subpoena issued February 1, 1961, incorporated by reference the affidavits of Lieutenant General Carroll, Major General Albert M. Kuhfeld and Lieutenant Colonel Robert A. Prince, as well as Air Force Regulations 62-14 and 62-14A. (J.A. 5-16), which accompanied the Government's identical motion regarding the Sharp subpoena, referred to *supra*. Appellant's opposition to the motion to quash was filed March 1, 1961. (J.A. 52). The court initially granted the motion on March 28, 1961, which grant was vacated on April 25, 1961. (J.A. 54). The Court then ruled against the Secretary's motion on April 25, 1961, (J.A. 55), and ordered him to give his deposition by Order dated May 18, 1961. (J.A. 62-63).

On May 23, 1961, the Secretary moved to vacate the Order of May 18th and to quash and filed an affidavit of Secretary Zuckert asserting a claim of Executive Privilege. (J.A. 64-65).

On May 26, 1961, the Court permitted the filing of the claim of privilege and postponed the taking of the Secre-

tary's deposition. (J.A. 65-66). Appellant opposed the claim of privilege by opposition filed June 6, 1961. (J.A. 67-73). On August 1, 1961, the Court below per Walsh, J., entered the Order appealed from without opinion (J.A. 74), and Appellant, respondent below, filed Notice of Appeal on August 26, 1961 (J.A. 74).

Subsequent to filing of briefs and oral argument, the United States Court of Appeals issued an Order to Show Cause (R.A. 84)[3] October 9, 1962 to the Secretary of the Air Force as to "... why Appellant should not be permitted to examine by deposition any desired witnesses from the list appearing on page 41 of the Joint Appendix, and why the Appellee should not permit any or all of such witnesses to testify as to all matters relating to the cause of the accident here involved except as to facts and matters of a classified nature and why such witnesses would not be permitted and authorized to refresh their memories by reference to any statements made by them before Aircraft Accident Investigating Board or investigating officers as well as other pertinent and material records that are in the possession of the United States Air Force." The Secretary agreed to the examination by deposition provided no costs or expenses were to be borne by the Department of the Air Force and further agreed to the witnesses refreshing their memories by reference to any statements made by them or pertinent and material records in the possession of the United States Air Force. (R.A. 86). Petitioner, Machin, replied to the Secretary's answer (R.A. 89) by citing the opinion of Judge Matthews of the District Court who had the offer permitting witnesses to testify before her at which time she found the offer inadequate. She also pointed out if these witnesses were called by the Peti-

[3] R. A. refers to the transcript of record from the United States Court of Appeals, District of Columbia Circuit.

tioner to testify they would rely on their statements which were not accessible to him. It was further pointed out that the documentary evidence could not be available to Petitioner's own expert witnesses to enable them to testify in his pending New York action against the manufacturer. The incongruity of denying Petitioner access to records used by witnesses to refresh their recollection was fully disclosed in Opinion by Judge Wright in a case dealing with the identical Air Force "offer" *United Air Lines* v. *United States*, 186 F. Supp. 824. The impossible financial burden upon the Petitioner was also pointed out to the Court in an argument against the proposed procedure.

On November 14, 1962, the Clerk of the United States Court of Appeals by direction of the Court inquired (R.A. 99) whether the Government would show ". . . Appellant Maclin any photographs of the wrecked plane and its parts which may be in the possession of the Air Force, or to give copies of such photographs to him or both." The Government agreed to provide copies at Petitioner's cost. (R.A. 100) In answer to the Government's reply concerning photographs (R.A. 102), Petitioner pointed out the valueless aspect of the Government's offer without the use of the Aircraft Accident Investigation Report for a ready frame of reference and identification. Since the manufacturer had already indicated that the only evidence relating to the condition of the propeller assembly at the time of the crash was contained in the investigation report, the inadequacy of the Government's offer became self vident. After the Government's response to the Petitioner's answer concerning production of photographs (R.A. 113), the Court of Appeals rendered its opinion of January 17, 1963. (Appendix 19).

In its opinion the Court upheld the claim of privilege in part giving the Secretary 20 days within which to show cause why the factual findings of the mechanics who in-

vestigated the wreckage should not be given to Appellant. The Government responded to the opinion (R.A. 124) and offered copies of reports from which it deleted "expressions of opinion, conjecture and speculation." Petitioner's reply (R.A. 133) to the Secretary's response deplored the ex party determination by the Secretary as to what mechanics reports were and his deletions therefrom. The Secretary responded (R.A. 137) to Petitioner's comments on the opinion.

Thereafter, on March 9, 1963 the Court of Appeals filed a supplemental opinion, (Appendix 26) in which it directed *in camera* examination of the mechanics' reports to determine the line between privileged and unprivileged statements appearing therein. Contemporaneously with the filing of the Supplemental Opinion, the Court entered its judgment (Appendix 29) remanding the District Court for further proceedings consistent with its opinions.

Petitioner moved for clarification of the Supplemental Opinion and for amendment of the judgment (R.A. 146) authorizing the District Court to examine the entire record contained in the investigation report and to furnish not only the mechanics' reports but the reports of any Air Force employees who examined the records, whether military or civilian, and requesting the Government to make witnesses available for deposition. After the Secretary's objection to Petitioner's move to clarify supplemental opinion and enter judgment (R.A. 153), the Court denied the same. In his objections, the Secretary in effect confessed error when he stated, "In addition, he will submit to the District Court two other documents, which, upon reexamination of the file, appellee considers to be within the designation of findings of "mechanics who examined the wreckage." Thereafter petition for rehearing en banc was filed (R.A. 163) and denied (R.A. 170) and this petition for certiorari ensued.

Reasons for Granting the Writ

The decisions below should be reviewed because previous cases dealing with the question of protection to be afforded to documents in the possession of the government do not cover the substantive issues raised by this petition. The leading case on the subject was decided by this court in *United States* v. *Reynolds*, 345 U.S. 1 (1953), which also involved the Aircraft Accident Investigation Report. Unlike *Machin*, the privilege asserted in *Reynolds* was one well recognized for documents containing military or state secrets, a point stated by the Court of Appeals in its opinion of January 17, 1963.

The alleged hampering of efficient operations and impairment of national security are unfounded. The affidavit of the Inspector General and the Judge Advocate General (JA 8-12), merely assert a conclusion concerning reduction in aircraft accidents without showing the interrelationship to the Aircraft Accident Report. The contention that disclosure would inhibit admissions by witnesses' has been frequently answered against the Air Force. (*Evans et al.* v. *U.S.*, 10 F.R.D. 255 (D.C. W.D. La., 1950). In *United Air Lines* v. *United States*, supra, the court stated as follows:

> "Are not the courts also entitled to full and frank disclosure? Judicial endorsement of the policy advocated by the Inspector General would be completely intolerable, and would not be in accord with the proper and efficient administration of justice. Federal Courts cannot be relegated to a second class status. To assess blame and redress wrongs, judicial tribunals must insist upon full disclosure, for this is the best method of ascer-

taining truth. Why the Air Force is entitled to more honesty than a court of law is completely outside the ken of this judge."

The New York manufacturer of the propeller assembly has indicated that all information concerning the assembly is contained solely in the Air Force Aircraft Accident Investigation Report. Failure to obtain full discovery will likely result in justice denied to Petitioner due to absence of any adequate alternative source of obtaining probative evidence to prosecute his claim.

Although the Petitioner, Machin; is appealing for relief from his intolerable legal position, he symbolically represents millions of military and civilian servants of the United States who must not be denied their right of recovery for injury occasioned by the negligent actions of those doing business with the government.

The reliance by the Government upon its authority to prescribe regulations, 10 U.S.C. 8012(b), must be tempered by the public policy as set forth by the Congress in 5 U.S.C. 22 as amended, "This section does not authorize withholding of information from the public or limiting the availability of records to the public".

The question of necessity has been decided in favor of the Petitioner by Judge Matthews in the District Court. We are therefore, left with the sole question of the Secretary's claim of Executive Privilege.

The Secretary claims the existence of a broad Executive Privilege which permits him unilaterally to prevent discovery of any sort with respect to the Aircraft Accident Investigation Reports. When pressed by the Court of Appeals, he made begrudging concessions, reserving always the right to limit the application to the instant case, and refusing always to go to that point which would make the

discovery meaningful to Petitioner. Privileges which are ordinarily asserted in Courts fall into categories of recognized evidentiary immunities. For example, secrecy of grand jury deliberations, *United States* v. *Procter & Gamble*, 365 U.S. 677 (1958); informers privilege, *United States* v. *Kohler*, 9 F.R.D. 289 (D.C. E.D. Pa., 1949); work product of an attorney, *Hickman* v. *Taylor*, 329 U.S. 495. The Secretary has made no showing of recognized evidentiary privilege. The self-serving declarations of the Secretary were further criticized by Judge Wright in *United Air Lines* v. *United States*, supra, where he commented on identical tactics as follows:

> "The Government's offer (1) to make available the witnesses appearing before the various boards for examination by the plaintiff; (2) to authorize these witnesses to testify regarding all matters pertaining to the cause of the accident; and (3) to authorize these witnesses to refresh their memories by reference to any statements made by them before Aircraft Accident Investigating Boards or Investigating Officers, as well as other pertinent and material records, that are in the possession of the United States Air Force, does not accord plaintiff that which it is entitled to under the circumstances of this case.
>
> "Permitting these persons to refresh their recollections by statements previously made, and at the same time to deny plaintiff access to these records, would allow the witness to control that which he desires to disclose. The Plaintiff would be entirely without adequate means to probe the testimony. It seems incongruous for the Government on the one hand to state that it will permit the witness to refresh his recollection by resort to prior recorded statements, and at the same time, to deny their disclosure to the plaintiff."

In a free and open society, it is unconscionable that an Executive Department should be permitted to withhold information from the public in the absence of a clear involvement of military or state secrets.

In the event of the existence of valid grounds for partial non-disclosure, it is essential that this Court set the correct guidelines for the in-camera examination by the lower Court. The Machin "Problem" is one which is arising and has arisen with great frequency. It has a vital effect upon the public's relationship with its government. The guidelines should require as a minimum the examination of the entire Aircraft Investigation Report file and a determination by the District Court of the extent of discovery to be permitted. The limitation by the Court of Appeals to Mechanics' Reports as the sole item for review by the District Court is so narrow as to be meaningless and should be discarded. The Secretary should no longer be permitted his ex-parte determinations as to the scope of discovery afforded to Petitioner. He should be compelled to make available for deposition, all witnesses whose names have heretofore been furnished in the Government's Answers to Interrogatories and to provide them with copies of their statements made before the Aircraft Accident Investigation Board.

Conclusion

The Court should recognize the dire need for a firm pronouncement on the substantive issues here presented. It is conceit upon the part of the executive in a democratic society to arrogate to himself the sole determination of what shall and what shall not be disclosed to the public. Congress has made its intent clear. This Court should do likewise. Ample judicial protection exists to protect the executive from undue disclosure. The Courts can make

the determination, balancing the needs of the requesting party as against the recognized evidentiary privileges. To hold otherwise would make of this government three individual trees, rather than a single tree with three branches stemming from a common root.

This Court must prevent the emasculation of the case of the innocent, gravely injured Appellant. It must do so not alone because of his terrible injuries, nor because he was the victim of a government supplier's negligence which literally cut him in half and condemned him to spend the rest of his waking hours in a wheel chair, nor because Machin was injured in the prime of life while serving his country. It must not deny to millions of military and civil servants of the United States whom Machin symbolically represents, their right of recovery for injury occasioned by the negligent acts of those doing business with the government. The governmental investigatory process must not be used as a sword to defeat the legitimate claims of injured litigants.

The questions presented by this case are of great and recurring significance. The serious questions of public policy involved herein make a complete reversal of the court below mandatory. This case is peculiarly appropriate for the exercise of the discretionary jurisdiction of this Court.

Respectfully submitted.

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APPENDIX

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,732

JACK S. MACHIN, *Apellant*,

v.

EUGENE M. ZUCKERT, Secretary of the Air Force, *Appellee*

Appeal from the United States District Court for the District of Columbia

Decided January 17, 1963

Mr. Harry S. Wender, with whom *Mr. Jules Fink* was on the brief, for appellant.

Miss Kathryn H. Baldwin, Attorney, Department of Justice, of the bar of the Supreme Court of Wisconsin, *pro hac vice*, by special leave of court, with whom *Assistant Attorney General William H. Orrick, Jr.*, and *Messrs. David C. Acheson*, United States Attorney, and *John G. Laughlin, Jr.*, Attorney, Department of Justice, were on the brief, for appellee. *Mr. Jerry C. Straus*, Attorney, Department of Justice, also entered an appearance for appellee.

Before WASHINGTON, DANAHER and BURGER, Circuit Judges.

WASHINGTON, *Circuit Judge*: In this case appellant seeks the production of certain reports in the files of the Department of the Air Force, concerning an aircraft accident in which appellant was badly injured. The Secretary of the Air Force has asserted a claim of privilege. The present appeal is from an order of the United States District Court for the District of Columbia quashing a subpoena served on the Secretary.

The facts are set out in an opinion filed by Judge Matthews of the District Court on April 25, 1961. *In re Zuckert*, 28 F.R.D. 29. It is enough to say here that on

May 17, 1956, a B-25 bomber of the United States Air Force took off from Lowry Air Force Base, Denver, Colorado. Shortly after take off, one of the pilots reported an overspeeding propeller. An attempt was made to return to base, but the aircraft crashed. Appellant Machin, one of the crew members, was the only survivor. After a period of hospitalization, he brought an action in the United States District Court for the Southern District of New York against United Aircraft Corporation, the manufacturer of the propeller assemblies, on the theory that the right propeller overspeeded and then failed to feather properly, this being his recollection of how the accident occurred. He then attempted to obtain the Aircraft Accident Investigative Report prepared by the Air Force immediately after the accident. He was permitted to see the report briefly but not to copy it or make notes from it.[1] Appellant thereafter demanded a copy of the report, by letter addressed to the then Secretary of the Air Force. On August 1, 1958, the Secretary's office declined to release the report, but offered to provide a list of names of witnesses who had testified before the Accident Investigation Board and enclosed a "releasable summary" of the report. Further negotiations followed. Plaintiff was not satisfied and finally decided to subpoena the Secretary. A subpoena was issued in the New York action on December 13, 1960, and was served on the Secretary of the Air Force on or about January 28, 1961. The Secretary thereupon moved in the District Court for the District of Columbia that the subpoena be quashed. The motion was denied by Judge Matthews, for the reasons given in the above cited opinion. Judge Matthews pointed out that "no claim of privilege has been asserted or is being decided."

Judge Matthews' order refusing to quash the subpoena was filed on May 18, 1961. On May 23 the Secretary of the Air Force filed a formal claim of privilege and moved to vacate the order of May 18. On May 26 Judge Matthews ordered that the Secretary's motion be denied "insofar as

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[1] The Government now says that this inspection was beyond the authority of the official who permitted it.

it seeks to vacate the order of May 18, 1961," but without prejudice "to the consideration and determination of so much of the motion of May 23, 1961 as seeks to quash the subpoena on the new grounds therein asserted." Thereafter, the matter came before District Judge Walsh, who, after considering "the claim of privilege submitted by the Secretary and the memoranda and affidavits submitted in support of and in opposition to the motion" ordered that the motion to quash be granted. This appeal followed.

After hearing argument, we issued the following order to show cause:

> "It appearing to the court that in *United States* v. *Reynolds*, 345 U.S. 1, the United States offered to produce certain witnesses and to authorize them to testify 'regarding all matters relating to the accident except as to facts and matters of a classified nature,' and to allow them 'to refresh their memories by reference to any statements made by them before Aircraft Accident Investigating Boards or Investigating Officers, as well as other pertinent and material records that are in the possession of the United States Air Force,' see Record in the Supreme Court in that case at page 27; and it further appearing that an equivalent offer has not been made to appellant Machin; it is hereby
>
> "ORDERED by the court that the appellee Eugene Zuckert, Secretary of the Air Force, show cause within twenty days why a similar offer should not be made to appellant Machin, namely, why appellant should not be permitted to examine by deposition any desired witnesses from the list appearing on page 41 of the Joint Appendix herein, and why the appellee should not permit any or all of such witnesses to testify as to all matters relating to the cause of the accident here involved except as to facts and matters of a classified nature, and why such witnesses should not be permitted and authorized to refresh their memories by reference to any statements made by them before Aircraft Accident Investigating Boards or Investigating Offi-

cers, as well as other pertinent and material records that are in the possession of the United States Air Force.

"Within 10 days after the service of appellee's answer the appellant may serve and file a reply. The answer and reply may be filed in typewritten or mimeographed form, and an original and six copies of each shall be submitted for filing."

The Secretary's response offered to appellant the relief described in our order. He later offered, in addition, to supply appellant with copies of some 34 photographs of the wrecked plane and its parts, from the files of the Air Force. Appellant strenuously urges that these measures of relief are not adequate. He insists that he be shown the investigative report, and in fact the entire Air Force file on the matter.

It is clear from the record before us that the Secretary's "Claim of Executive Privilege" was not an assertion of personal immunity from the judicial mandate embodied in the subpoena, but rather was an attempt to assert the privileged status of the documents in the Secretary's possession.[2] The Secretary stated:

"I have concluded that the production of the documents called for by the subpoena would prejudice the efficient operation of the Department of the Air Force and the defense interests of the United States, would be contrary to the public interest, and hence would not be warranted. Accordingly, pursuant to the authority vested in me as Secretary of the Department of the Air Force, I assert the privileged status of the reports called for by the subpoena of February 1, 1961, and must respectfully decline their production. . . ."

Certain affidavits filed by the Government in the course of the proceedings below, especially a statement by the

[2] The subpoena in question is subject to Fed. R. Civ. P. 26(b), which provides in part: "Unless otherwise ordered by the court as provided by Rule 30(b) or (d), the deponent may be examined regarding any matter, *not privileged* . . . ." (Emphasis supplied.)

Inspector General of the Air Force, indicated with somewhat more specificity the manner in which it is believed that disclosure will be harmful to the public interest. According to the Inspector General, the Air Force's flight safety program, a major aspect of which is the investigation of accidents, has contributed greatly to a continuously decreasing rate of accidents involving Air Force planes and personnel. The success of the program depends in large part on the ability of the investigators to get full information on the cause of any accident. Lacking the power to compel testimony, the investigators encourage frank and full cooperation by means of promises that witnesses' testimony will be used solely for the purposes of flight safety and will not be revealed to persons outside the Air Force. The Inspector General went on to say that:

> "... if investigators were unable to give such assurances, testimony in many instances would be less than fully factual and the determination of the exact causative factors would be jeopardized, thus seriously hindering the accomplishment of prompt corrective action designed to preclude recurrences of similar accidents. Technical representatives of the aviation industry currently assisting in aircraft accident investigations could not be expected to find their company at fault if their reports could be used in actions against their companies."

Previously decided cases dealing with the question of protection to be afforded to documents in the possession of the Government do not cover the question now before us. The leading case on the subject is *United States* v. *Reynolds*, 345 U.S. 1 (1953), which also involved an Air Force accident investigation report. In that case, however, the privilege asserted was an already well recognized privilege for documents containing military or state secrets. Here no such claim is made.

We agree with the Government that when disclosure of investigative reports obtained in large part through promises of confidentiality would hamper the efficient operation of an important Government progra and perhaps even,

as the Secretary here claims, impair the national security by weakening a branch of the military, the reports should be considered privileged. Especially is that so when they are sought in connection with a litigation to which the Government is not a party and when the responsible executive official has been as cooperative as the record in this case reveals the Secretary to have been.

Insofar, therefore, as the subpoena sought to obtain testimony of private parties who participated in the investigation, we agree with the District Court that such information in the hands of the Government is privileged. The privilege extends to any conclusions that might be based in any fashion on such privileged information. Also, a recognized privilege attaches to any portions of the report reflecting Air Force deliberations or recommendations as to policies that should be pursued. See *Boeing Airplane Co. v. Coggeshall*, 108 U.S.App.D.C. 106, 112, 280 F.2d 654, 660 (1960); *Zacher v. United States*, 227 F.2d 219 (8th Cir. 1955), cert. denied, 350 U.S. 993 (1956); *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F.Supp. 939, 946 (Ct.Cl. 1958).

The parties, in argument before us, have treated the investigative report as a unit that should either be entirely disclosed or entirely suppressed.[3] From our review of the case, however, it appears to us that certain portions of the report could be revealed without in any way jeopardizing the future success of Air Force accident investigations. We refer to the factual findings of Air Force mechanics who examined the wreckage. Their investigations and reports would not be inhibited by knowledge that their conclusions might be made available for use in future litigation, and their findings may well be of utmost relevance to the litigation now pending between appellant and United Aircraft. Moreover, we have in the past suggested that information of this sort would ordinarily be subject to subpoena for use in connection with litigation to which it is relevant. *Boeing Airplane Co. v. Coggeshall*, *supra* at

[3] We have not, of course, received the report or any part of it, much less had the opportunity to peruse it.

112-13, 280 F.2d at 660-61. Since the reasons given by the Government for holding the investigative report privileged do not, on their face, apply to information of this sort, we consider that, to this limited extent, the subpoena should have been enforced.

We recognize that there may be reasons not presently appearing to us why even this portion of the report should be immune from subpoena. We will, therefore, withhold entry of judgement for 20 days to permit the Secretary to show cause why the factual findings of the mechanics who investigated the wreckage should not be given to appellant. In all other respects we uphold the Secretary's claim of privilege.

So ordered.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,732

JACK S. MACHIN, *Appellant*,

v.

EUGENE M. ZUCKERT, Secretary of the Air Force, *Appellee*

Appeal from the United States District Court for the District of Columbia

Supplemental Opinion, Filed March 9, 1963

WASHINGTON, *Circuit Judge*: In response to our opinion of January 17, 1963, the Secretary has offered to make limited disclosure of the mechanics' reports. The offer, according to the paper submitted in response to our opinion, "is limited to factual findings. It does not extend ... to expressions of opinion, conjecture or speculation." Accordingly, the Secretary has had certain portions of the mechanics' reports deleted. Appellant remains dissatisfied, and requests us to grant the following relief:

> "1. That the Appellee be compelled to disclose the full contents of the Aircraft Investigation Report excluding reports from nongovernmental personnel for use by Appellant in prosecuting his claim against United Aircraft Corporation.
>
> "2. That this Court in camera examine the contents of the Aircraft Investigation Report in order to rule upon the documentary material which shall be disclosed for use by the Appellant."

In our opinion of January 17, we held that the contents of the Accident Investigation Report were privileged, with the exception of that portion of the file containing the "factual findings of Air Force mechanics who examined the wreckage." As we pointed out, the case was argued by appellant on the assumption that he was entitled to the en-

tire report, and no request was made by him for any lesser form of relief. Had we chosen, as we could have, to pass only on the request for relief submitted by him, his appeal would have failed. In the interest of substantial justice, however, we offered him partial relief from the decision of the lower court. Now that he has seen the decision, appellant asks us, in effect, to reopen the case and determine anew what in the report is and what is not properly considered privileged. We are unwilling at this point to grant a request that may well lead to a complete relitigation of the case.

On the other hand, we do not believe that the "offer" made by the Secretary constitutes adequate compliance with the decision we handed down. When set against the entire opinion, his construction of the phrase "factual findings of the mechanics" is too narrow. By this phrase we meant anything in their reports that did not fall within any of the areas of privilege recognized in the opinion, which were summed up as follows:

> "Insofar, therefore, as the subpoena sought to obtain testimony of private parties who participated in the investigation, we agree with the District Court that such information . . . is privileged. The privilege extends to any conclusions that might be based in any fashion on such privileged information. Also, a recognized privilege attaches to any portions of the report reflecting Air Force deliberations or recommendations as to policies that should be pursued."

If the mechanics expressed any "opinions" or "conclusions" as to possible defects in the propellors or propellor governors that might have been due to the negligence of United Aircraft, we do not consider that such expressions would come within the privileges enunciated in our opinion. Where the line is properly drawn between privileged and unprivileged statements appearing in the mechanics' reports is impossible to ascertain without viewing the reports themselves in their entirety. In this connection, we cannot accept the notion that the Secretary should himself decide what portions of the reports are or are not privi-

leged. This is ordinarily a task for the court. We are aware that in *United States* v. *Reynolds*, 345 U.S. 1, 11 (1953), the Supreme Court did not require submission of the report there involved to a court for a judicial determination of the applicability of the privilege invoked to the contents of the report in question. But this disposition was clearly dependent in large part on the nature of the privilege there invoked—the protection of military secrets. In our case, in contrast to *Reynolds*, no substantial harm could result from submission of the report to judicial scrutiny. Consequently, it is our opinion that the mechanics' reports should be submitted in their entirety to the District Court on remand, and that that court should determine what portions are privileged.

So ordered.

Filed March 9, 1963 Nathan J. Paulson, Clerk.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Misc. 7-61

September Term, 1962

No. 16,732

JACK S. MACHIN, *Appellant*,

v.

EUGENE M. ZUCKERT, Secretary of the Air Force, *Appellee*

Appeal from the United States District Court for the District of Columbia.

Before: WASHINGTON, DANAHER and BURGER, *Circuit Judges*.

JUDGMENT

WHEREAS, this cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel; and whereas this court filed an opinion in this case on January 17, 1963, but withheld the entry of judgment to permit the Secretary of the Air Force to show cause why the factual findings of the mechanics who investigated the wreckage should not be given to appellant; and the court having considered appellee's response to the request to show cause, appellant's reply thereto, and appellee's answer; it is now; therefore,

ORDERED and ADJUDGED by this court that the order of the District Court on appeal herein is hereby set aside and this case is remanded to the District Court for further proceedings consistent with the opinion of this court filed January 17, 1963, and supplemental opinion this day filed herein.

Per Circuit Judge Washington.

Dated: March 9, 1963.